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IN THE

Supreme Court of the United States

October Term, 1968

No. 473

JOHN H. BINGLER, District Director of Internal Revenue,
Petitioner,

v.

RICHARD E. JOHNSON, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The respondent taxpayers oppose the Petition of John H. Bingler. District Director of Internal Revenue, for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these cases.

Opinions Below

The district court's instructions to the jury are not officially reported. They are unofficially reported at 19 A. F. T. R. 2d 426. The opinion of the court of appeals (Petitioner's Appendix B, pages 5a-17a) is officially reported at 396 F. 2d 258.

Jurisdiction

The grounds on which the jurisdiction of this court is invoked are stated in the Petition for Writ of Certiorari.

Statute and Regulations Involved

The relevant provisions of the Internal Revenue Code of 1954 and of the Treasury Regulations on Income Tax (1954 Code) are set forth in the Petition for Writ of Certiorari, Appendix A, pages 1a-3a.

Question Presented

Whether an employer may make a scholarship grant to an employee (who is a degree candidate at an educational institution) which may be excludable from gross income under Section 117 of the Internal Revenue Code of 1954 without the necessity of establishing such grant as a gift.

Statement

Each of the respondents was an employee of Westinghouse Electric Corporation in Pittsburgh, Pennsylvania, at its Bettis Atomic Power Laboratory.

Westinghouse had initiated a doctoral program which provided employees of the company with the opportunity of securing the degree of Doctor of Philosophy in engineering and science. The program was undertaken in cooperation with the University of Pittsburgh and Carnegie Institute of Technology (now Carnegie-Mellon University) (R-14a).[1]

The respondents were enrolled as students at the respective universities in the same manner and were

(1) "R" refers to the Appendix to Respondents' Brief in the Court of Appeals.

required to meet the same scholastic standards for the degree as other graduate students (R-14a). Westinghouse had no control whatever in the educational program other than in supplying funds to make it available (R-42a). During the first four years under the program, a participant devoted 32 hours per week on his regular work assignment for Westinghouse and attended classes at either Carnegie Tech or Pitt for the other eight hours as a regularly enrolled student (R-82a). During this period, each respondent was paid his full salary as an engineer at Westinghouse on which income tax was paid (Tr-40).[2]

During the fifth year of the program (after having satisfactorily completed the scholastic requirements of the respective universities to proceed) the participants were granted an educational leave of absence of nine to twelve months from their employment to allow them time to conduct research and to write and defend a thesis topic as required by the universities for the granting of the degree. During this leave, the plaintiffs had no duties and performed no services whatever for Westinghouse (Tr-53), all of their time being devoted to their research and thesis topic.

The nature of the thesis topics selected by the respondents was not in any way related to the work being done at Westinghouse except to the extent that it was in the field of engineering and science (Tr-62, 124, 154). The results of the research were of no direct value to Westinghouse and the government neither contended nor offered proof to the contrary (Tr-54).

While on educational leave, Westinghouse, under the program, gave each of the respondents a monthly allow-

(2) "Tr" refers to transcript of testimony.

ance which was a percentage of his salary with adders for the number of children in the family. Westinghouse also paid the tuition, books, fees, etc.

Previous to the educational leave, each of the respondents was receiving a salary from Westinghouse for services rendered which was commensurate with the salaries of other engineers at Westinghouse. Subsequent to the termination of the educational leave and upon resumption of their employment services with Westinghouse, the respondents again received salaries which were commensurate with the salaries of other engineers employed at Westinghouse (Tr-72).

The trial of the case before a jury in the district court evolved into an issue of law, rather than an issue of fact. Must a scholarship grant to an individual who is a candidate for a degree at an educational institution be in the nature of a gift (that is, must there be an absence of any motive of self-interest on the part of the grantor in making the scholarship grant) in order for the scholarship to be excludable under Section 117 of the Internal Revenue Code.

Upon equivocal instructions by the court in submitting the case to the jury, the jury answered in the negative the interrogatory

> "Were the amounts received by (respondents) from Westinghouse as scholarship at an educational institution excludable from gross income."

In reversing, the court of appeals stated

> "Appellants' stipends were awarded as subsidies to fulltime students, in an amount varying in appropriate relation to each recipient's needs. Their continuance was contingent upon the participants' maintenance of the academic standards required of a candidate for a graduate degree by the university which each appellant

> attended. While receiving these grants, appellants were on an academic leave of absence from their employment for the specific purpose of completing their doctoral dissertations. These are the most important positive characteristics which appellants' grants share with scholarships generically. * * *" (Petitioners' Appendix B, page 7a).

The court of appeals concluded that the grant to the respondents as candidates for a degree at an educational institution was a scholarship within the meaning of Section 117 of the Internal Revenue Code and that the grantor's subjective intention in making the scholarship grant available was irrelevant (Petitioners' Appendix B, page 13a).

Reasons Why the Writ Should Not Be Granted

1. The decision of the third circuit in this case is in conformity with the decision of the Tax Court of the United States, *William Wells,* 40 T. C. 40 (1963) where the Tax Court stated, at page 49:

> "But the language of Section 117 and its legislative history make it clear that amounts received as a scholarship or fellowship grant may be compensatory in character and may still be excludable from income."

and also the decision of the Tax Court in *Clarence Peiss,* 40 T. C. 78, wherein the Court stated, page 82:

> "It is no longer of interest whether transfers that are scholarship or fellowship grants are gifts."

The Commissioner of Internal Revenue has not appealed the decision of *Wells,* has acquiesced in the decision; and moreover, has announced that the applicable regulations will be amended accordingly. Revenue Ruling 65-59, I. R. B. 1965-1.

All that remains to be done to eliminate the asserted conflict which the petitioner relies on and one which he himself has structured and nurtured is for him to fulfill his oft-announced promise to amend the ambiguous and equivocal regulations involved. See *Elmer L. Reese, Jr.*, 45 T. C. 407, footnote 6, page 416.

2. The judgment of the court of appeals is that the judgment of the district court will be reversed and the case remanded for proceedings not inconsistent with the opinion of the court of appeals.

The government's position with respect to the case at this juncture is that the decision of the court of appeals calls for a new trial and not for the entry of judgment for the taxpayers (See footnote 7, page 6, Petition for Writ).

If this contention is proper and the judgment of the court of appeals is not a final decision but only a reversal with directions to grant a new trial, then the Petition for a Writ of Certiorari should be denied as not involving a final decision. *Slaker vs. O'Connor*, 278 U. S. 188, 49 S. Ct. 158.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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